

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH WEBB)	
Claimant)	
VS.)	
)	Docket No. 137,625
ANDYS OF TOPEKA)	
Respondent)	
AND)	
)	
TRI-STATE INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent, its insurance carrier, and the Workers Compensation Fund requested review of the Award dated February 29, 1996, entered by Special Administrative Law Judge Douglas F. Martin. The Appeals Board heard oral argument on July 23, 1996.

APPEARANCES

Mark W. Works of Topeka, Kansas, appeared for the claimant. Mark A. Buck of Topeka, Kansas, appeared for the respondent and its insurance carrier. Darin M. Conklin of Topeka, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Appeals Board considered the medical report dated November 11, 1994, prepared by Peter V. Bieri, M.D., who was appointed by the Administrative Law Judge to perform an independent medical evaluation.

ISSUES

The Special Administrative Law Judge awarded claimant permanent total disability benefits and evenly divided the liability between the respondent and the Workers Compensation Fund. The respondent, its insurance carrier, and the Workers Compensation Fund requested this review. The only issues now before the Appeals Board are: (1) nature and extent of disability, (2) Fund liability, and (3) whether the Fund is entitled to an award for its attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

(1) Claimant injured his back while working for the respondent on May 9, 1989, while lifting a heavy box. The parties do not dispute that fact in this review. The accidental injury occurred on claimant's second day of work for the respondent. Because of the back injury claimant is limited to light work.

Claimant has a long history of severe mental illness which has been diagnosed as chronic paranoid schizophrenia and which is accompanied by delusions and hallucinations. At the time of the deposition of psychiatrist Stephen E. Peterson, M.D., in May 1993, claimant had been hospitalized 15 different times since his medical discharge from the U. S. Air Force in 1982. Between that medical discharge and the date of accident, claimant had worked only two days outside of a controlled environment--the day of the accident and the day before the accident. The back injury did not contribute to or alter claimant's mental condition. After the accident, claimant has again been hospitalized due to his mental illness.

Claimant contends he is entitled to receive permanent total disability benefits because he is unable to engage in any substantial or gainful employment. Respondent contends claimant's psychiatric condition created the permanent total disability if, in fact, permanent total disability exists.

Based upon the entire record, the Appeals Board finds that claimant was realistically unemployable before the May 1989 accident because of his severe ongoing mental illness. Claimant was employable only for so long as his schizophrenia was controlled which was a rare occurrence between 1982 and 1989. As a practical matter, claimant's ability to perform work in the open labor market was not affected by the May 1989 back injury. Before the work-related accident, claimant was essentially unemployable and unable to hold employment because of his severe mental illness. After the accident claimant's open labor market did not change as claimant's mental illness continued to prevent him from entering the open labor market and working.

Because his is an “unscheduled” injury, claimant’s entitlement to permanent partial disability benefits is governed by K.S.A. 1988 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

When considering claimant’s preexisting mental illness, the physical injury claimant received neither reduced claimant’s ability to perform work in the open labor market nor his ability to earn a comparable wage.

The Appeals Board finds claimant should be awarded permanent partial disability benefits based upon his whole body functional impairment rating for the back injury only. Board certified orthopedic surgeon Michael Schmidt, M.D., who treated claimant for a short period after the accident, believes claimant sustained a 5 percent whole body functional impairment due to the back injury. On the other hand, board-certified orthopedic surgeon Nathan Shechter, M.D., believes claimant sustained a 25 to 30 percent whole body functional impairment due to the back condition. Finally, Peter V. Bieri, M.D., whom the Administrative Law Judge selected to provide an independent medical evaluation, feels claimant has a 15 percent whole body functional impairment. The Appeals Board is not persuaded that any one of those doctors’ opinions should be given greater weight, and, therefore, the Appeals Board finds that claimant’s whole body functional impairment is 16 percent for which claimant should receive permanent partial disability benefits.

(2) The Workers Compensation Fund bears no liability in this proceeding. Before the Workers Compensation Fund is responsible for any portion of an award, the evidence must establish a preexisting impairment either caused or contributed to the injury or ultimate disability. See K.S.A. 1988 Supp. 44-567(a)(1), (2).

As indicated above, the May 1989 accident neither aggravated nor otherwise exacerbated claimant’s preexisting mental illness. Also, the evidence does not establish that claimant had a preexisting back condition or any other type of preexisting physical impairment which was affected by the May 1989 accident.

(3) The Appeals Board finds the Workers Compensation Fund’s request for attorney fees should be denied. The Appeals Board finds that the factual situation presented justified respondent impleading the Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated February 29, 1996, entered by Special Administrative Law Judge Douglas F. Martin should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kenneth Webb, and against the respondent, Andys of Topeka, and its insurance carrier, Tri-State Insurance Company, for an accidental injury which occurred May 9, 1989, and based upon an average weekly wage of \$105 for 415 weeks at the rate of \$11.20 per week or \$4,648, for a 16% permanent partial general disability.

As of March 31, 1997, there is due and owing claimant 411.86 weeks of permanent partial disability compensation at the rate of \$11.20 per week in the sum of \$4,612.83, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$35.17 is to be paid for 3.14 weeks at the rate of \$11.20 per week, until fully paid or further order of the Director.

The Workers Compensation Fund is absolved of liability in this proceeding.

The Appeals Board hereby adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above orders.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark A. Buck, Topeka, KS
Mark W. Works, Topeka, KS
Darin M. Conklin, Topeka, KS
Office of Administrative Law Judge, Topeka, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director